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ABSTRACT

This monograph reviews the law applying to defamation issues, cites various judicial decisions that affect colleges and universities, and offers guidance for minimizing the risk of defamation liability. It defines the two subclasses of defamatory statements: first, libel, which is a recorded or printed statement, and second, slander, which is spoken or oral. It then discusses the four elements that make a statement defamatory in relation to current case law: (1) a false statement of fact concerning a person; (2) publication or the unprivileged communication of the false statement to a third party; (3) a degree of fault on the part of the person communicating the statement; and (4) privilege or harm to the reputation of the person defamed. In reviewing and discussing the types of university personnel actions that create the potential for defamation claims, it lists situations such as performance evaluations and terminations for cause, and also provides a list of policy guidelines for providing employment references. Defamation issues that involve students and liability for student commentary are also discussed, with the suggestion that college and university administration be cognizant of First Amendment freedoms for the student press. Fifty one notes provide extensive citations. (Contains 14 references.) (CH)

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THE PUBLICATION SERIES

Defamation Issues in Higher Education

FRANCINE TILEWICK BAZLUKE

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National Association of College and University Attorneys

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The views expressed herein are to attributed to the author and not to the National Association of College and University Attorneys. This pamphlet is intended for general informational purposes only, and does not constitute legal advice. An attorney should be consulted regarding the specific facts and circumstances associated with any legal matter or case.

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Defamation Issues in Higher Education

Introduction[1]

University campuses provide fertile ground for defamation claims. As a marketplace of ideas, a university both tolerates and encourages free expression. Commentary on issues of campus and public concern, whether by employees or students, may include criticism affecting the professional or personal reputation of its subjects.

In addition, many activities undertaken by a university in the normal course of its operations create the potential for defamation claims, including providing performance evaluations and references for employees and students; taking personnel and student disciplinary actions; and sponsoring various programs and activities, such as student newspapers, academic journals and speakers.

Given these considerations, campus community members should be acquainted with the fundamentals of defamation law. This pamphlet describes that law, identifies various judicial decisions affecting universities, and offers guidelines for minimizing the risk of defamation liability.

DEFAMATION LAW OVERVIEW

Defamation involves the use of language concerning another person in a manner that is harmful to that person's reputation. Defamatory statements are subclassified as "libel" or "slander." "Libel" is generally defined as recorded defamation, whether in print or other media. "Slander" is spoken or oral defamation.[2]

Defamation generally consists of four elements: (A) a false statement of fact concerning

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1. For stylistic reasons, the term "university" encompasses both colleges and universities.

2. For a discussion of the distinction between libel and slander, including special definitional problems posed by various communications media, *see* Rodney A. Smolla, *Law of Defamation*, § 1.04 (1995). Issues associated with the use of computers as a means of communication are beyond the scope of this pamphlet, but see articles cited in the Selected Bibliography on page 22.

another; (B) unprivileged communication of the statement to a third party; (C) in most instances, some degree of fault on the part of the person communicating the statement; and (D) harm to the reputation of the person defamed. Both federal constitutional and state law affect the degree of proof required for each of these elements, as delineated below.

False Statement of "Fact" Concerning a Person

A defamation victim must first establish that the allegedly defamatory statements are false.[3] If a statement is in fact true, no defamation action may be advanced, no matter how egregiously a person is harmed. The disputed statement must also involve or imply an assertion of fact rather than opinion, as there is a legally significant distinction between facts (which may be demonstrably proven true or false) and opinions (which generally are not actionable under defamation law unless a factual basis is asserted or implied).[4]

The disputed statement must be obviously defamatory (that is, harmful to reputation) or, if ambiguous in terms of defamatory import, the

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3. *Collins v. Martinez*, 709 F.Supp. 311 (D.P.R. 1989), *aff'd.*, 894 F.2d 474 (1st Cir. 1990) (largely true statements to agencies regarding alleged unprofessional conduct in research were non-actionable); *Goldman v. Wayne State Univ. Board of Governors*, 390 N.W.2d 672 (Mich. App. 1986) (medical school recommendation letter statements apparently based upon true and undisputed facts). Under common law, truth served as an affirmative defense to a defamation claim, the burden of proof thus resting on the defendant. In the wake of the constitutional law developments described below, the weight of authority appears to be that, in cases where actual malice must be shown as an element of proof, the plaintiff must demonstrate that the statement in issue is false. *See* Smolla, *supra* note 2, § 5.05.

4. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the U.S. Supreme Court ruled that the First Amendment permits defamation actions under state law only where a communication states or implies actual facts. The *Milkovich* Court nonetheless declined to accord statements of opinion any constitutionally-based "privilege." *See also Washington v. Smith*, 893 F.Supp. 60 (D.D.C. 1995), *aff'd.*, 80 F.3d 555 (D.C. Cir. 1996) (*Milkovich* applied to sports article about women's basketball coach); *Banks v. Dominican College*, 42 Cal. Rptr.2d 110 (Cal. Ct. App. 1995) (explanation of reasons for dismissal from teacher certification program is protected statement of opinion); *Maynard v. Daily Gazette Co.*, 447 S.E.2d 293 (W.Va. 1994) (newspaper editorial concerning former university athletic program director contained protected opinion); *Kimura v. Superior Court*, 281 Cal. Rptr. 691 (Cal. Ct.App. 1991) (allegations of racism and bigotry are protected opinion as issues of public concern on a campus); *Hunt v. Univ. of Minn.*, 465 N.W.2d 88 (Minn. Ct. App. 1991) (comments in employment reference are protected opinion); *Lester v. Powers*, 596 A.2d 65 (Me. 1991) (student letter relative to tenure review contained non-actionable statements of opinion); *Moyer v. Amador Valley Joint Union High School Dist.*, 275 Cal. Rptr. 494 (Cal. Ct. App. 1990) (student newspaper article about high school teacher contained opinions not factual assertions).

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statement must be made in a context that gives rise to a reasonable inference of defamatory meaning.[5] A statement not obviously defamatory is nonetheless actionable if the defamatory implication becomes apparent with the addition of extrinsic facts.[6] Finally, the defamation must be "of and concerning" a living person who claims injury. The injured party may, however, also be a corporation; thus, there is at least implied authority for the proposition that a university has the right to sue.[7]

"Publication": Unprivileged Communication to a Third Party

The second element of defamation is "publication," a term of art meaning the intentional or negligent communication of a defamatory statement to a person other than the one claiming harm through essentially any means (e.g. written or oral, and a variety of media).[8] Any repetition of a defamatory communication is considered a separate publication that can also give rise to independent or additional liability exposure.[9]

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5. *Lafayette Morehouse, Inc. v. Chronicle Pub. Co.*, 44 Cal. Rptr.2d 46 (Cal. Ct. App. 1995) *rev. denied*, 46 Cal. Rptr.2d 542 (Cal. 1996) (newspaper characterization of university in local dispute); *Davis v. Borskey*, 660 So.2d 17 (La. 1995) (statements regarding university bidding practices); *Handler v. Arends*, No. 0527732S 1995 WL 107328 (Conn. Super. Ct. March 1, 1995) (libel by omission or innuendo in tenure denial case); *Bauer v. Murphy*, 530 N.W.2d 1 (Wis. App.) *rev. denied* (relationship between innuendo and slander *per se*); *Anderson v. Vanden Dorpel*, 645 N.E.2d 250 (Ill. App. Ct. 1994) *rev'd.*, No. 78669, 1996 WL 189400 (Ill. April 18, 1996) (application of innocent construction rule); *Hylton v. American Ass'n for Vocational Instructional Materials, Inc.*, 448 S.E.2d 741 (Ga. Ct. App. 1994) (resolution announcing administrator leave of absence not defamatory *per se* nor capable of defamatory construction by innuendo); *Nazeri v. Mo. Valley College*, 860 S.W.2d 303 (Mo. 1993) (false allegation of homosexuality or serious sexual misconduct such as adultery is actionable); *Salek v. Passaic Collegiate School*, 605 A.2d 276 (N.J. Super. Ct. App. Div. 1992) (yearbook photographs non-actionable); *Livingston v. Murray*, 612 A.2d 443 (Pa. Super. Ct.) *appeal denied*, 617 A.2d 1275 (Pa. 1992) (newspaper article statements concerning comparative qualifications of new athletic director not defamatory); *Walko v. Kean College of N.J.*, 561 A.2d 680 (N.J. Super. Ct. Law Div. 1988) (parody or spoof without ostensible factual basis is non-actionable).

6. *See* Smolla, *supra* note 2, § 4.05.

7. *See Ithaca College v. Yale Daily News Publishing Co.*, 433 N.Y.S.2d 530 (N.Y. Sup. Ct. 1980), *aff'd.*, 445 N.Y.S.2d 621 (N.Y. App. Div. 1981); *see also Doman v. Rosner*, 371 A.2d 1002 (Pa. Super. Ct. 1977) (institute); *see generally* Smolla, *supra* note 2, § 4.11[3].

8. Although signs or symbols may qualify as communications, *see* Smolla, *supra* note 2, § 4.12[1], actions will not necessarily be construed as forms of defamatory communication. *See, e.g., Hicks v. Stone*, 425 So.2d 807 (La. Ct. App. 1982), *writ. denied*, 429 S.2d 129 (La. 1983) (board action in firing a dean was not itself a published "statement").

9. For a discussion of re-publication liability and related questions, see Smolla, *supra* note 2, §§ 4.12-4.14; and relative to the special

While it is usually obvious whether the requisite "third party" is present, interesting legal issues arise with respect to these aspects of proof. The first of these issues concerns the legal status of communications among persons employed by or affiliated with a legal entity, such as a corporation or university. Some courts hold that in-house communication does not constitute "publication" when the communication pertains to corporate concerns, reasoning that individuals are not third parties with respect to their corporation. Other courts view the issue to be whether a qualified privilege should apply to communications made to protect a common interest i.e., communications made between individuals who have an interest in, or a duty regarding, the subject matter.[10] An otherwise applicable privilege may be lost, however, in the event of "excessive publication," i.e., publication beyond the necessary scope of communication.[11]

A second issue involves the status of statements communicated by the injured party. Under the relatively new doctrine of "compelled self-publication," an employer may be held liable for defamation if a former employee is compelled to communicate, to a prospective employer, past negative job performance appraisals or the reason for discharge from past employment. In such an instance, "publication" may be attributed to the former employer if the ex-employee's need to convey the statements is reasonably foreseeable and ethically or otherwise necessitated by the circumstances.[12]

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considerations associated with media defendants, *see* id. at § 4.14 and nn. 21 and 22 below.

10. *See generally* Smolla, *supra* note 2, §8.08[3]; 1 Lex K. Larson & Philip Borowsky, *Unjust Dismissal* §§ 4.06[2] (1996); Stevens, "Evaluation of Faculty Competence as a 'Privileged Occasion,'" 4 *Journal of College & University Law* 281, 283 (1977); and see, *e.g.*, *Handler*, 1995 WL 107328 (question turns on who has business reason to know); *Hylton*, 448 S.E.2d 741 (memorandum circulated only to persons at corporate board meeting not "published"); *Nazeri*, 860 S.W.2d 303 ("publication" occurred when statements were uttered to newspaper reporters); *Walter v. Davidson*, 104 S.E.2d 113 (Ga. Ct. App. Div. 1958) (no "publication" as between college personnel charged with duty of student oversight).

11. But *see Gallo v. Princeton Univ.*, 656 A.2d 1267 (N.J. Super. Ct. App. Div.), *rev. denied*, 663 A.2d 1359 (N.J. 1995) (publication not excessive in light of nature of university community).

12. *See, e.g., Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876 (Minn. 1986); *see generally* Mouser, "Self-Publication Defamation and the Employment Relationship," 13 *Industrial Relations Law Journal*

Fault Requirements

The third element of defamation requires a showing of some degree of fault on the part of the person publishing the statement. In this regard, a new doctrine emerged when the United States Supreme Court recognized the First Amendment dimensions of defamation law in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The case involved an advertisement addressing the conduct of elected officials toward civil rights demonstrations in Alabama. A Montgomery, Alabama city commissioner filed suit, alleging that the advertisement defamed him and the police force. The Court held that, to prevail on a defamation claim, public officials must establish that the wrongdoer acted with "actual malice," defined as knowledge of falsity or reckless disregard for the truth.

The U.S. Supreme Court has since identified certain classes of individuals, known as "public officials" and "public figures," about whom greater latitude of commentary is allowed under the rubric of the First Amendment. Although the legal parameters are still emerging, "public officials" typically are persons responsible for sovereign or governmental functions, such as by virtue of their elective or appointive office.[13] "Public figures" may be defined as persons who achieve sustained fame or notoriety ("general purpose public figures"), or passing fame or notoriety relative to a matter or controversy of public concern or interest ("limited purpose public figures").[14]

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241 (1991/1992); Posey, "Employer Defamation: The Role of Qualified Privilege," 30 *William and Mary Law Review* 469, 480-83 (1989); Charles G. Bakaly, Jr. & Joel M. Grossman, *The Modern Law of Employment Relationships*, § 12.3 (1992). The compelled self-publication doctrine has been criticized on the ground that its application may deter employers from disclosing to employees the reasons for discharge. Although approving the doctrine, the *Lewis* court declined to award punitive damages on this basis.

13. *See* Cloud, "Higher Education Administrators, Defamation and Actual Malice," 86 *Education Law Reporter* [593] (Jan. 13, 1994); Bjorklun, "Are Teachers Public Officials for Defamation Purposes?", 80 *Education Law Reporter* [527] (Apr. 8, 1993); Hopkins, "Teachers as Public Officials in Libel Actions," 47 *Education Law Reporter* [353] (Sept. 1, 1988).

14. For an extensive discussion of this doctrine and case law examining characterization of persons as public officials or public figures, *see* Smolla, *supra* note 2, chapter 2. *See also* Stonecipher & Sneed, "A Survey of the Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine," 46 *Arkansas Law Review* 303 (1993).

The rule enunciated in the *New York Times* decision, and further developed in later cases, thus heightens the proof-of-fault requirements for persons to whom public status is imputed. The justification for imposing this greater burden of proof is rooted both in the First Amendment guarantees of free expression and, at least implicitly, in the notion that people invite or assume certain risks of commentary through their involvement in matters of public interest, whether by virtue of employment or other activity.

No "bright line" test exists relative to either the "public official" or "public figure" classification, but there is a growing body of law construing the doctrine. Persons held to be "public officials," for example, include a university purchasing agent, police official, law professor and vice chancellor for research.[15] "Public figures" have included protesters, a college, an institute, a research scientist, basketball coach, law school dean, college dean, a group of junior college professors, and a state university athletic director; but not a former head community college basketball coach, assistant basketball coach, behavioral scientist, department chair or certain university professors.[16]

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15. *Davis*, 660 So.2d 17 (purchasing agent); *Waterson v. Cleveland State Univ.*, 639 N.E.2d 1236 (Ohio Ct. App. 1994) (university police official); *Grossman v. Smart*, 807 F.Supp. 1404 (C.D. Ill.), *aff'd. other grounds sub nom. Purnell v. Smart*, 976 F.2d 735 (7th Cir. 1992) (assistant professor of law and vice chancellor of research); and see nn. 13 and 14 above, as well as *Law of the Student Press* 110-12 (Student Press Law Center 1994) (and cases cited therein).

16. *Nadel v. Regents of Univ. of Cal.*, 34 Cal. Rptr.2d 188 (Cal. Ct. App. 1994) (protestors); *Ithaca College*, 433 N.Y.S.2d 621 (college); *Doman v. Rosner*, 371 A.2d 1002 (Pa. Super. Ct. 1977) (institute); *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.) *cert. denied*, 501 U.S. 1212 (1991) (scientist at private research firm); *Barry v. Time, Inc.*, 584 F.Supp. 1110 (N.D. Cal. 1984) (head basketball coach); *Grayson v. Curtis Pub. Co.*, 436 P.2d 756 (Wash. 1967) (college basketball coach); *Avins v. White*, 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. (1980) (law school dean); *Byers v. Southeastern Newspapers Corp. Inc.*, 288 S.E.2d 698 (Ga. Ct. App. 1982) (college dean); *Hicks*, 425 So.2d 807 (education dean); *Johnson v. Board of Junior College Dist.*, 334 N.E.2d 442 (Ill. App. Ct. 1975) (junior college professors); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (state university athletic director); *compare Foise v. Delgado Community College*, 776 F.Supp. 1133 (E.D. La. 1991) (head basketball coach); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990) (assistant basketball coach); *Foote v. Sarayan*, 432 So.2d 877 (La. Ct. App. 1982), *writ denied*, 440 So.2d 736 (La. 1983) (department chair and two professors); *Staheli v. Smith*, 548 So.2d 1299 (Miss. 1989) (faculty); *Fleming v. Moore*, 275 S.E.2d 632 (Va. 1981), *cert. denied*, 472 U.S. 1032 (1985) (faculty); and see discussion in *Arroyo v. Rosen*, 648 A.2d 1074 (Md. Ct. App. 1994) (university department chair), as well as materials cited in nn. 13 and 14 above, and *Law of the Student Press*, *supra* note 15, 112-14.

Privilege[22]

The foregoing elements must be established in order to win a defamation case. Even so, an otherwise viable claim of defamation may fail if the defending party successfully asserts that the communication is "privileged."

An "absolute" privilege bars recovery for defamation, regardless of the motive of its publisher; it typically applies to communications made in judicial or legislative proceedings.[23]

A "qualified" privilege governs communications between persons who share a common interest in, or duty relative to, the subject matter, such as communications between organization personnel. The conditional nature of this privilege, or its "qualification," typically depends on whether the communication is made on a proper occasion, in good faith and without excessive publication.[24]

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22. With respect to media defendants, note the emerging neutral report-age privilege, *see* Smolla, *supra* note 2, § 4.14; and the related common law "fair report" privilege, which allows media re-publication of fair and accurate reports of certain proceedings, *see id.* §§ 8.01[3], 8.10; *see also e.g., Barry v. Time, Inc.*, 584 F.Supp. 1110 (N.D. Cal. 1984) (neutral reportage privilege); *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991) (fair report privilege).

23. *See, e.g., Slater v. Marshall*, 895 F.Supp. 93 (E.D. Pa. 1995) (student statement alleging stalking and sexual harassment on part of professor not absolutely privileged under judicial process doctrine); *Dixon v. Superior Court*, 36 Cal. Rptr.2d 687 (Cal. Ct. App.1994) (environmental proceedings); *Board of Regents of Univ. of Minn. v. Reid*, 522 N.W.2d 344 (Minn. Ct. App. 1994) (sovereign immunity).

24. *See, e.g., Garstang v. Superior Court*, 46 Cal. Rptr.2d 84 (Cal. Ct. App. 1995) (mediation over which ombudsperson presided); *Gallo*, 656 A.2d 1267 (qualified privilege and scope of publication); *Handler*, 1995 WL 107328; *Arroyo*, 648 A.2d 1074 (administrative agency matter); *Moshtaghi v. The Citadel*, 443 S.E.2d 915 (S.C. 1994) (scope of privilege); *Koerselman v. Rhynard*, 875 S.W.2d 347 (Tex. Ct. App. 1994) (tenure review); *Olsson v. Indiana Univ. Board of Trustees*, 571 N.E.2d 585 (Ind. Ct. App. 1991) (student teacher evaluation and employment reference); *Hunt*, 465 N.W.2d 88 (employment reference); *Lester*, 596 A.2d 656 (student letter solicited by tenure review committee subject to conditional privilege); *Garvey v. Dickinson College*, 763 F.Supp. 796 (M.D. Pa. 1991) (dean's veiled reference to one faculty member as a "hostile junior colleague" in reference provided for another faculty member subject to qualified privilege); *Vargo v. Hunt*, 581 A.2d 625 (Pa. Super. Ct. 1990) (student disclosure of alleged student honor code violation was conditionally privileged); *Rosenthal v. Regents of Univ. of Cal.*, 269 Cal. Rptr. 788 (Cal. Ct. App. 1990) (report by university committee relative to academic program and performance of former chair was either non-actionable opinion or privileged); *Gautschi v. Maisel*, 565 A.2d 1009 (Me. 1989) (tenure committee member had qualified privilege to share with committee comments made by a faculty member at another institution regarding candidate's qualifications); and *see Aldridge v. De Los Santos*, 878 S.W.2d 288 (Tex. Ct. App. 1994) ("official immunity" and faculty senate censure). For a comprehensive discussion of privileges generally, *see* Smolla, *supra* note 2, ch. 8.

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UNIVERSITY PERSONNEL ACTIONS

Employment relationships create considerable potential for defamation claims. Among the situations that commonly give rise to such actions are those involving performance evaluations; adverse employment actions, such as suspensions or terminations; and employment references.

Performance Evaluations

The courts address defamation claims concerning performance evaluations in a number of ways, influenced not only by the particulars of the applicable state law, but by the specific facts of the case. An evaluation may be found to be non-actionable opinion insofar as it is based on highly subjective qualitative judgments,[25] because its content fails to harm reputation[26], or because it is not "published" in the legal sense of the term.[27]

Even where the key elements of defamation are otherwise established, a defense of privilege typically is raised. Some courts consider performance evaluations absolutely privileged, reasoning, for example, that the evaluating official is executing a legally-mandated duty.[28] Other courts assign absolute privilege to evaluative judgments communicated in administrative or quasi-judicial employment proceedings (such as grievance or disciplinary hearings), either on the basis of common law or statutory privilege, or on the theory that the plaintiff consented to the proceeding that gave rise to the disputed communication.[29]

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25. *See, e.g., McConnell v. Howard Univ.*, 621 F.Supp. 327 (D.D.C. 1985), *modified*, 818 F.2d 58 (D.C. Cir. 1987); *Baker v. Lafayette College*, 504 A.2d 247 (Pa. Super. Ct. 1986), *aff'd.*, 532 A.2d 399 (Pa. 1987); *Belliveau v. Renick*, 504 A.2d 1360 (R.I. 1986).

26. *See, e.g., Rubinstein v. Univ. of Wisc. Bd. of Regents*, 422 F.Supp. 61 (E.D. Wis. 1976); *Keddie v. Penn. State Univ.*, 412 F.Supp. 1264 (M.D. Pa. 1976); *Johnson v. Bd. of Junior College Dist.*, 334 N.E.2d 442 (Ill. App. Ct. 1975).

27. *See, e.g., Sophianopoulos v. McCormick*, 385 S.E.2d 682 (Ga. Ct. App. 1989).

28. *See, e.g., Petroni v. Bd. of Regents*, 566 P.2d 1038 (Ariz. Ct. App. 1977); *Shearer v. Lambert*, 547 P.2d 98 (Ore. 1976); and *see Neary v. Regents of Univ. of Ca.*, 230 Cal. Rptr. 281 (Cal. Ct. App. 1986); *Stukuls v. State of N.Y.*, 366 N.E.2d 829 (N.Y. 1977).

29. *See, e.g., Webster v. Byrd*, 494 So.2d 31 (Ala. 1986) (privilege); *Chonich v. Ford*, 321 N.W.2d 693 (Mich. Ct. App. 1982) (legislative privilege applied to trustees); *Glaze v. Marcus*, 729 P.2d 342 (Ariz. 1986) (consent).

The prevailing view seems to be that performance evaluations are entitled to a qualified privilege.[30] To preserve the privilege, courts generally require proof that (1) the evaluation was undertaken by an appropriate university official (as determined by established procedures and/or customary institutional practice); (2) the disputed communications were relevant to the employment issues reviewed; and (3) the official conveyed the evaluation only to persons with a legitimate interest in, or duty regarding, the subject matter.[31]

A good faith, substantiated judgment that a faculty or staff member does not merit reappointment, promotion or the award of tenure or permanent employment will not necessarily itself form the basis of a successful defamation claim.[32] Situations may arise, however, where the stated basis of the adverse action implies undisclosed facts that are defamatory, or where the evaluation is completed under circumstances that give rise to an inference of bad faith or mixed motive. While courts tend to defer to the expertise that underlies qualitative judgments of this nature, decision making processes and associated communications may be more closely scrutinized where troublesome indicators such as bad faith or mixed motives are present.

Terminations for Cause

Employment termination for cause is a qualitatively more serious action than non-reappointment, with attendant consequences under defamation law. For-cause termination

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30. *See, e.g., Koerselman*, 875 S.W.2d 347 (tenure review); *Greenya v. George Washington Univ.*, 512 F.2d 556 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1975); *Bellveau*, 504 A.2d 1360; *Kaplan v. MacNamara*, 497 N.Y.S.2d 710 (N.Y. App. Div. 1986); *Colson v. Steig*, 433 N.E.2d 246 (Ill. 1982); *McCunn v. Cal. Teachers Ass'n*, 83 Cal. Rptr. 846 (Cal. Ct. App. 1970); and *see Doman*, 371 A.2d 1002 (Pa. Super. Ct. 1977) (conditional privilege for research of scientist's report).

31. For an interesting discussion of an employer's qualified privilege to publicize application of its anti-sexual harassment policy to its employee, see *Garziano v. E.I. Du Pont DeNemours & Co.*, 818 F.2d 380 (5th Cir. 1987). *See also Rosenboom v. Vanek*, 451 N.W.2d 520 (Mich. App. 1989) ("shared interest" qualified privilege extends to moral and social obligations as well as legal duties; thus, faculty member, who did not establish actual malice *viz.* allegedly slanderous remarks to his superior regarding a sexual assault, failed to overcome the privilege).

32. See Aiken, "Substantive Categories of Tort Liability," 3 *Journal of College & University Law* 249, 265-67 (1976).

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customarily occurs in cases of gross nonfeasance or malfeasance, thus setting the stage for a per se defamation claim.

While an extended discussion of employment termination issues is beyond the scope of this pamphlet, considerable caution must be exercised with respect to defamation when investigating performance concerns or misconduct, particularly if the investigative findings may lead to for-cause termination. Counsel should be consulted to assist in the design of the investigation, with appropriate regard for contractually- or constitutionally-mandated procedures.[33] Communications should be limited to persons who have an undisputable "need to know" or who have knowledge of facts essential to resolving the matter. Due care must be exercised to disclose the identity of the subject of the investigation only where necessary, and confidentiality generally must be maintained insofar as possible. At publicly-affiliated institutions, laws granting access to public meetings and records may further complicate the situation.[34]

Employment References

How to provide forthright employment references, yet avoid defamation exposure, is a challenge of the highest order. Most jurisdictions recognize a qualified privilege for such communications, reasoning that former and prospective employers share a legitimate interest in the subject matter of the reference. The privilege may be forfeited, however, if its necessary scope is exceeded, such as where damaging information is shared with persons who do not need to know, or where information is mali-

33. At public institutions, due process must be provided in conjunction with deprivation of a property or liberty interest as guaranteed by the Fourteenth Amendment to the U.S. Constitution. With respect to the matter of "name-clearing" hearings, defamation alone does not impair the "liberty interests" otherwise protected by the due process clause. Rather, to establish due process entitlement, the aggrieved employee must assert and prove that the allegedly defamatory remarks issued in the course of termination caused damage to reputation sufficient to foreclose employment opportunities. *See Paul v. Davis*, 424 U.S. 693 (1976); and *see generally* discussion in William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* § 3.6.2.1 n.48 and § 3.6.2. (1995).

34. To attempt to mitigate liability exposure when records disclosure is otherwise compelled under public access laws, counsel might consider filing a motion for protective order seeking partial redaction or similar relief, and *in camera* document inspection pending resolution of such motion.

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ciously, gratuitously or otherwise improperly disseminated.

Growing recognition of the tort of "negligent hiring" is motivating some employers to check references thoroughly before offering employment. A troubling offshoot of this development, however, is that a current employer may sue a former employer on the ground that the latter failed to disclose misconduct on the part of a former employee.[35] The extent to which this practice heightens the disclosure obligations of a former employer is still unclear, although some commentators suggest that only deliberate misrepresentations should be actionable.[36]

Summary and Guidelines

Many university personnel actions are governed by explicit policies and procedures, as well as by established institutional practices. Any contract and constitutional law requirements associated with these protocols must be honored to avoid liability exposure under various theories of recovery. Personnel actions also present defamation concerns.

The relatively new tort of negligent hiring may impose a duty of care upon an employer to check references as well as to inquire of the candidate as to any criminal convictions, professional censures or other matters relevant to his or her qualifications and fitness. It is prudent to obtain from applicants or candidates written consent to check references, and to advise such persons that failure to disclose information requested on an application or similar inquiry may ultimately provide a basis for disciplinary action, including termination.

Persons responsible for evaluating performance should receive training and should be alert to the need to document performance problems accurately. Documents maintained in a personnel file should either be self-substantiating or readily subject to verification. Access to personnel files should be limited to persons with an objectively sustainable "need to know," and

35. *See* discussion in *Randi W. Livingston Union Sch. Dist.*, 48 Cal. Rptr.2d 378 (Cal. Ct. App. 1995), *review granted and opinion superseded*, 913 P.2d 457 (Cal. 1996).

36. *See, e.g.*, Bakaly & Grossman, *supra* note 12, 330.

their contents disclosed in a manner consistent with sound internal protocols, or as required by law in consultation with counsel.

When the evaluation process necessarily involves peer review or communications between administrators, it is important that the persons consulted have a legitimate interest in, or duty relative to, the evaluation, and that subsequent discussion is limited to such persons. Academic administrators, faculty, and university counsel should also be mindful of the U.S. Supreme Court decision in *University of Pennsylvania v. EEOC*, 493 U.S.182 (1990), which required disclosure of "confidential" faculty peer evaluations to the U.S. Department of Labor Equal Employment Opportunity Commission.[37] Whether this decision will have a "chilling effect" on the forthrightness of peer reviews – particularly if agency files are subject to inspection or disclosure under the Freedom of Information Act – is as yet unclear.

Issues specially associated with employment terminations are reviewed above. In sum, for-cause terminations may be highly stigmatizing and, therefore, should be pursued with appropriate deference not only to contractual and constitutional requirements but to defamation liability exposure. Thus, confidentiality should be maintained to the greatest extent possible, and information shared and solicited on a "need to know" basis only.

Some commentators recommend that employment applications include a provision whereby the individual waives future rights of action relative to employment references and that, in the absence of such a release, the employer simply verify the fact and period of employment. While this approach has some appeal as a means of avoiding a defamation claim, the legal enforceability of such a waiver is debatable. Moreover, from a policy standpoint, this approach is also subject to criticism insofar as it may insulate unacceptable candidates from adequate scrutiny or encourage

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37. The U.S. Supreme Court declined to recognize an academic freedom privilege in the context of this discrimination case. For a discussion of the decision and related issues, see Kaplin & Lee, *supra* note 33, § 3.7.7.1.

informal "fishing expeditions" with an even greater potential for liability.

With these various considerations in mind, certain precautions regarding references may be advisable[38]:

- References should be solicited from appropriate individuals (i.e., ostensibly appropriate individuals in light of their position and relationship to the subject of the reference). In turn, the university officials from whom references are requested should ensure that they are the appropriate source of the reference under university protocols.
- Due care should be exercised when providing references to ensure that any statements made are true and capable of verification. Evaluations based upon subjective opinions should be conveyed as such, without any implication that the opinions are based on undisclosed facts. It would also be prudent to review the underlying personnel or student file before furnishing a reference.
- Gratuitous, subjective evaluations of character or personality (as opposed to performance) should be avoided, as they are usually irrelevant to the proper scope of the inquiry, and may give rise to discrimination as well as defamation claims.
- References generally should not be provided by a person who has a history of interpersonal conflict with, or ill will towards, the subject of the reference. If feasible, responsibility for providing references in such cases should be re-assigned to someone who can make a credible claim of objectivity and whose duties might logically include this task.
- A copy of the reference should be maintained confidentially.
- Legal counsel should be consulted before a problematic reference is issued. In particularly sensitive cases, a reference might be confined to a written statement previewed by counsel.

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38. See Tidwell, "Educators' Liability for Negative Letters of Recommendation," 15 *Journal of Law & Education* 479, 483 (1986) (student references).

Finally, a university should maintain adequate insurance coverage for the defense and indemnification of defamation claims.[39]

STUDENT DEFAMATION ISSUES

Students as Defamation Victims

Various situations prompt students to file defamation claims. Academic evaluations, as well as suspension or expulsion decisions, for example, involve judgments and facts potentially harmful to a student's reputation, and thus to academic or employment prospects; references and letters of recommendation pose additional areas for potential conflict. Students may also become the subject of campus commentary, whether in student newspapers, local media or more casual campus settings.[40]

Courts typically accord faculty broad discretion in their evaluation of student academic performance, in keeping with a long tradition of judicial deference to such judgments. A qualified privilege to comment will generally be recognized if the evaluation occurs in the proper context, such as where a faculty member is serving as a course instructor, advisor, or clinical supervisor.[41] It may also be argued that a student implicitly consents to evaluation upon enrollment in a course of study, under a quasi-contractual theory that binds students to institutional policies and procedures.[42] Most qualitative judgments regarding student performance contain opinions and, therefore, are non-actionable, at least if not explicitly or implicitly based on provably false "fact."[43]

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39. Many insurance policies expressly exclude defamation claims, and coverage must be obtained through policy endorsement or independent sources. Although discussion of insurance issues is beyond the scope of this pamphlet, for an analysis of related considerations, see, *e.g.*, Smolla, note 2, ch. 14.

40. See, *e.g.*, *Holt v. Cox Enterprises*, 590 F.Supp. 408 (N.D. Ga. 1984) (former college football player); *Klahr v. Winterble*, 418 P.2d 404 (Ariz. Ct. App. 1966) (student senator as public official).

41. See, *e.g.*, *Olsson*, 571 N.E.2d 585; *Cohen v. Hartlage*, 348 S.E.2d 331 (Ga. Ct. App. 1986); and see discussion of privileges above.

42. See, *e.g.*, *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145 (D.C. App. 1985).

43. See discussion of *Milkovich* at n.4 above. See also, *e.g.*, *Banks*, 42 Cal. Rptr.2d 110; *Assaad-Faltas v. Univ. of Arkansas for Medical Sciences*, 708 F.Supp. 1026 (E.D. Ark. 1989), *aff'd.*, 902 F.2d 1571 (8th Cir. 1990); *Goldman*, 390 N.W.2d 672 (medical school recommendation letter).

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Liability for Student Commentary

Most lawsuits filed against students involve defamation claims against student newspapers.[46] The authority to regulate the student press at public universities is subject to parameters established under the First Amendment to the U.S. Constitution.[47] Prior restraint is a form of censorship particularly repugnant to the free press guarantee of the First Amendment; thus, a publication advisory board, or any other means by which the university attempts to screen, influence or regulate content, may not survive a constitutional challenge.[48] Post-publication penalties, including distribution suppression, funding reductions or cut-offs,[49] as well as the imposition of disciplinary sanctions, such as suspension or expulsion of student editors,[50] may also be deemed unconstitutional. Consequently, only unusual circumstances will legally justify interference with the student press.

As a result of these Constitutional considerations, case precedent suggests that public university officials may not lawfully screen

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46. Students are, however, increasingly facing defamation claims advanced by university officials and fellow students. *See, e.g., Slater*, 895 F.Supp. 93 (professor counterclaimed defamation in connection with allegation of stalking in student sexual harassment case); *Lester*, 596 A.2d 65 (student letter challenged as defamatory in tenure case); *Vargo*, 581 A.2d 625 (student vs. student lawsuit for reporting perceived honor code violation).

47. *See generally* discussion in Kaplin & Lee, *supra* note 3, §§ 4.13.1 and 4.13.2; *see, e.g., Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *modified*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Antonelli v. Hammond*, 308 F.Supp. 1329 (D. Mass. 1970); *cf. Schneider v. Indian River Community College Found., Inc.*, 875 F.2d 1537 (11th Cir. 1989) (college trustees' control over news programming at non-commercial community college radio station is not infringement of employees' First Amendment rights, as those rights vest in trustees as station licensees). Private institutions are rarely subject to the constraints of the First Amendment (see Note, "Tort Liability of a University for Libelous Material in Student Publications," 71 *Michigan Law Review* 1061, 1076 n.77 (1973)), although similar entitlements may arise under state law, university governance documents, or university policy statements of a contractual nature. *See e.g., Wallace v. Weiss*, 372 N.Y.S.2d 416 (N.Y. Sup. Ct. 1975).

48. *See Near v. Minnesota*, 283 U.S. 697 (1931) (seminal prior restraint case); see, *e.g. Antonelli*, 308 F.Supp. 1329, and generally Note, "The First Amendment on Campus: The Rights of the Student Press v. The Rights of the Students," 14 *Journal of College & University Law* 505 (1988).

49. See, *e.g., Stanley v. McGrath*, 719 F.2d 279 (8th Cir. 1983); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973).

50. See, *e.g., Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973); *Trujillo v. Love*, 322 F.Supp. 1266 (D. Colo. 1971); *Dickey v. Alabama State Bd. of Educ.*, 273 F.Supp. 613 (M.D. Ala. 1967), *vacated other grounds sub nom. Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

student newspapers for defamation, suppress the publication of commentary likely to defame, or discipline student editors for publishing defamatory material. Thus, several courts have concluded that universities should not be held legally responsible for student press defamation since they are Constitutionally forbidden from engaging in oversight activity.[51]

In most instances, private universities are not subject to the First Amendment, and therefore do not enjoy the benefit of the Constitutional "shield." A court may, however, find that private institutions have a duty to establish publication guidelines and otherwise oversee operations, and it may apply a negligence standard in analyzing whether that duty was properly discharged.[52] It is also possible that a court will decline to impose such a duty in light of the relative maturity of college students.[53]

Guidelines

In general statements of policy, public universities should acknowledge the First Amendment freedoms accorded the student press. Consideration should be given as to whether any form of official recognition or sponsorship of a student newspaper is in the institution's best interests; at some universities, student newspapers are separately incorporated.[54]

If the newspaper receives official university sanction as a student activity, both the institution and the newspaper should proclaim publicly that neither the articles, nor the opinions expressed in the newspaper, are those of the

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51. *McEnaddy v. CUNY*, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995) *app. denied*, 642 N.Y.S.2d 195 (N.Y. 1996) (student newspaper not "agent" of university); *Mazart v. State*, 109 Misc.2d 1092, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981) (no principal-agent relationship because no right of control at State university); *see Milliner v. Turner*, 436 So.2d 1300 (La. Ct. App. 1983) (by implication); *compare Gallo*, 656 A.2d 1267 (statements appearing in independent student and alumni publications not attributable to private university), and *Wallace*, 372 N.Y.S.2d 416 (control is a question of fact at private university).

52. *See Salek*, 605 A.2d 276 (school officials did not negligently supervise yearbook).

53. *See Mazart*, 441 N.Y.S.2d 600.

54. Notwithstanding such incorporation, in resolving liability issues the courts will scrutinize the actual relationship between the university and the student periodical; see e.g., Note, "Tort Liability of a University for Libelous Material in Student Publications," 71 *Michigan Law Review* at 1074-75, 1085-86. An independent student newspaper should maintain its own insurance coverage, as its unaffiliated status may exempt it from coverage under other university insurance policies.

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university. Ideally, student editors should have access to independent legal counsel. Guidance concerning journalistic standards might be best conveyed through curricular means, educational events open to the campus at large and, preferably, an advisor without university affiliation.

Adequate insurance coverage remains an important risk management tool. The nature and extent of existing coverage should be verified, particularly as it relates to defamation claims, student activities generically, and punitive damages.

In the event that students do publish defamatory material, consideration should be given to appropriate responsive action. As explained earlier, disciplinary options at public universities are constrained by First Amendment guarantees. In unusual cases, the material published may violate state criminal or other statutes, and ostensibly provide a basis for action under a campus code of conduct whose provisions are linked to a proven violation of federal or state law. In situations involving a pattern of unlawful conduct, a university might consider "de-recognition" of the student newspaper (with attendant loss of sponsorship), assuming it can overcome any Constitutional challenge to such an action. Private institutions, on the other hand, may have greater oversight authority relative to the student press, but with such freedom may also come a potentially greater duty of supervision and corresponding liability in the event of libel.

CONCLUSION

The simplest advice – to "speak no evil" – cannot be heeded in an educational community that encourages the implementation of rigorous professional and academic standards, enforces performance and conduct expectations, and recognizes free expression as the currency of the marketplace of ideas. Although vigilance is required, the law of defamation will indeed tolerate most appropriate commentary through the application of Constitutional and common law privileges described in this pamphlet.

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